

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108
(617) 979-1900

MICHELLE ROGERS,
Appellant

v.

G1-17-185
G1-19-240

BOSTON POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

Joseph Sulman, Esq.¹
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Appearance for Respondent:

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Commissioner:

Cynthia A. Ittleman

DECISION

The Appellant, Michelle Rogers (Ms. Rogers or Appellant), filed timely appeals with the Civil Service Commission (Commission) in appeal docketed G1-17-185 (2017 Appeal) on September 19, 2017 and G1-19-240 (2019 Appeal) on November 18, 2019, both under G.L. c.

¹ Attorney Sulman represented the Appellant in appeal docketed G1-17-185.

² Attorney Donnellan represented the Appellant in appeal docketed G1-19-240.

³ Respondent's counsel in the 2017 appeal was Juliana DeHaan Rice, Esq., who is no longer employed by the Respondent.

31, s. 2(b), appealing the decisions of the Boston Police Department (BPD or Respondent) to bypass her for appointment to the permanent, full-time position of police officer. A prehearing conference was held in the 2017 Appeal on October 17, 2017 and in the 2019 Appeal on December 17, 2019, both at the Commission's office in Boston.⁴ A full hearing was held on January 17, 2018 and February 1, 2018 in the 2017 Appeal and on February 7, 2020 in the 2019 Appeal at the same location. After the testimony of Dr. Brown in the 2017 appeal hearing, the Appellant made an oral motion for a directed verdict. There being no explicit authority therefor in the Standard Adjudicatory Rules of Practice and Procedure, the motion was taken under advisement; given the ruling in this decision, the motion is denied as moot. Both hearings were digitally recorded and copies of the recordings were sent to the parties.⁵ All witnesses, with the exception of the Appellant, were sequestered. In the 2019 Appeal, the parties agreed to consolidate the 2017 Appeal and the 2019 Appeal since the 2019 bypass relied on the untruthfulness alleged in the 2017 Appeal, in addition to alleging that the Appellant failed the psychological evaluation in the 2019 bypass. The parties in the 2019 appeal offered no additional evidence regarding the Appellant's alleged untruthfulness in 2017 and presented evidence relating solely to the Appellant's alleged failure of the psychological evaluation in the 2019 bypass. The parties in both appeals filed post-hearing briefs. For the reasons stated herein, the appeals are allowed.

FINDINGS OF FACT

In the 2017 Appeal, fourteen (14) exhibits (2017 Exhibits (Ex./s)) 1 – 4, 5A, 5B and 6 -

⁴The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR ss. 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31 or any Commission rules taking precedence.

⁵If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

11) were jointly entered into the record at the hearing and Appellant's Exhibits (2017 A.Exs.) 1 and 2 was entered into evidence at the hearing. In the 2019 Appeal, sixteen (16) exhibits were offered jointly by the parties and entered into evidence at the hearing (2019 Exs. 1 – 16). Based on the exhibits and the testimony of the following witnesses:

Called by the Appointing Authority in the 2017 Appeal:

- Nancy Driscoll, Director, BPD Human Resources
- Dr. Andrew Brown, Psychologist

Called by the Appellant in the 2017 Appeal:

- Michelle Rogers (Appellant)

Called by the Appointing Authority in the 2019 Appeal:

- Mary Flaherty, then-Director of BPD Director of Human Resources (HR)
- Donald Seckler, Ph.D. (self-employed)
- Lance Fiore, Ph.D. (self-employed)

Called by the Appellant in the 2019 Appeal:

- Michelle Rogers (Appellant)

and taking administrative notice of all matters filed in both appeals; stipulations; pertinent statutes, case law, regulations, rules, and policies; and reasonable inferences from the credible evidence; a preponderance of the evidence establishes the following facts in both appeals:

2017 Appeal

1. The Appellant is a life-long resident of Boston, with the exception of her attendance at college in Arizona for a couple of years. (Testimony of Appellant) At the total of three (3) days of hearings in the 2017 Appeal and the 2019 Appeal, the Appellant appeared

confident, her comments were direct and straight forward and she was articulate. For these reasons, I find the Appellant credible.

2. The Appellant took and passed the civil service police officer exam on April 25, 2015. (2017)
3. The state's Human Resources Division (HRD) issued the eligible list in connection with the 2015 exam and issued Certification 04401 to the BPD on February 22, 2017 and March 12, 2017. (2017 Stipulation)
4. The Appellant's name ranked 74th among those who had signed the Certification indicating their interest in employment as a BPD police officer. (2017 Stipulation)
5. The BPD selected one hundred (100) candidates for appointment, twenty (20) of whom ranked below the Appellant. (2017 Stipulation)
6. The BPD conducted a background investigation of the Appellant. The information gathered in the background investigation was presented to the BPD roundtable. (Testimony of Appellant and Driscoll)
7. After the roundtable, the BPD issued a conditional offer of employment to the Appellant and the Appellant was scheduled to take the required medical examination on July 3, 2017. (2017 Testimony of the Appellant and Driscoll)
8. G.L. c. 31, s. 61A requires HRD to establish medical fitness standards for police and firefighter candidates. Pursuant to G.L. c. 31, s. 61A, HRD established the Initial-Hire Medical Standards and the Physician's Guide to the Standards (Medical Standards).⁶
9. The Medical Standards provide, in part, that the person evaluating the candidate is required to "[c]**arefully review the medical history with the examinee** and record in detail ... Medical conditions listed in the Medical Standards are classified as 'Category

⁶ The Medical Standards have been modified multiple times but the sections referenced herein remained unchanged.

A' or 'Category B' conditions. Category A conditions are considered absolutely disqualifying. For Category B conditions you are required to consider whether the particular examinee's condition would prevent him or her from safely and effectively performing the essential functions of the position ... If you find an examinee not qualified, you will need to indicate whether the condition is Category A or Category B and cite the applicable section of the Medical Standards. ... If you find that an examinee failed to provide a complete and accurate medical history, you will need to explain such ... **By itself, failure to provide a complete and accurate medical history will not necessarily disqualify the examinee** from meeting the medical standards, but may subject the examinee to administrative disqualification of employment or other adverse action by the appointing authority....” (2017 R.Ex. 2, pp. 4,5)(emphasis added)

10. With regard to psychiatric conditions, the Medical Standards indicate that a Category A condition “ ... shall include: [a]ny psychiatric **condition** that results in the candidate not being able to safely perform one or more of the essential job tasks [of a police officer].”

(Id.) A Category B condition includes “1) [a] history of psychiatric **condition** or substance abuse problem” or “2) [r]equirement for medications that increase an individual's risk of heat stress, or other interference with the ability to safely perform essential job tasks[.]” (Id. at 33)(emphasis added)

11. As part of a candidate's application packet, each candidate was required to provide the BPD with the candidate's complete medical record and to answer a questionnaire regarding his or her medical history (medical questionnaire). The Appellant obtained her medical records and answered this medical questionnaire; however, at the time that she filled out the questionnaire she had not yet received all of her medical records. When she

received her medical records, she submitted them to the BPD. (2017 Testimony of Appellant and Brown) The Appellant's medical record does not include any information from mental health providers. (Testimony of Brown)

12. On the medical questionnaire, the Appellant answered questions about mental health.

She answered "yes" to the question asking if she had been prescribed medication for pain, sleep, stress, work problems, and family problems and wrote that she had been prescribed Trazodone. (2017 R.Ex. 3 and Testimony of Appellant) Trazodone is classified as an anti-depressant but it is used for sleep problems instead of as an anti-depressant. (Testimony of Brown) The Appellant was prescribed Trazodone for sleeping difficulties after she was the member of her family who found her grandmother deceased. The Appellant did not indicate on the medical questionnaire that she had been prescribed two (2) medications (Celexa (10mg) and Xanax (.5mg) as needed) sometime in or about 2010 for mood and behavior because she did not take the medications and she did not even fill one of the prescriptions. (2017 R.Ex. 3 and Testimony of Appellant) However, the Appellant herself brought her medical records to her medical exam, which contained information regarding the medications that she was prescribed. (2017 R.Ex. 6)

Therefore, I find that the Appellant was not trying to conceal her medical history and was not untruthful.

13. The Appellant's medical records included a primary care gynecology office visit in 2010 at which the Appellant was physically examined, years before she applied to the BPD in 2017 and 2019. The Appellant was approximately twenty-one (21) years old in 2010. The office visit notes state that certain medical tests would be done, that the Appellant complained of anxiety at the office visit, that the Appellant was **prescribed** Celexa

(10mg), and that the Appellant was to see a social worker for anxiety. The same record also states that the Appellant had gone to a Boston behavioral health center at some point in time years earlier, where she was **given** Xanax for anxiety to take as needed but she “did not like the feeling of laways (sic) having the medication on Her (sic)”. (2017 R.Ex. 6)(emphasis added) The Appellant’s medical record further shows that in 2008, the Appellant had a medical appointment at the same location as the 2010 medical appointment. At the 2008 appointment, the Appellant was approximately nineteen (19) years old and she reported that she had experienced anxiety and/or panic attacks for the first time, which may have been connected to finding out that she could not complete a college education because her parents were no longer able to pay for her college tuition, and connected to her return to Massachusetts to live with her mother for the first time since her parents divorced when she was twelve (12) years old. As a teenager, the Appellant had a difficult relationship with her mother. The Appellant’s 2007 and 2006 medical records reflect solely annual medical exams. (2017 R.Ex. 6; Testimony of Appellant)

14. Prior to attending the BPD medical exam, the Appellant took two (2) psychological tests administered by BPD, which were scored by a computer and sent to Dr. Brown for his review. (2017 Testimony of Brown and Appellant) The two (2) tests were the Minnesota Multiphasic-Personality Inventory – 2-RF (MMPI-2-RF) and the Personality Assessment Inventory (PAI). (Testimony of Brown)

15. The MMPI-2-RF report states, in part,

Scores on the MMPI-2-RF validity scales raise concerns about the possible impact of under-reporting on the validity of this protocol. With that caution noted, scores on the substantive scales indicate somatic complaints. Somatic complaints relate to neurological symptoms. ...

The test taker presented herself in a positive light by denying some minor faults and shortcomings that most people acknowledge. This level of virtuous self-presentation may reflect a background stressing traditional values. She also presented herself as very well-adjusted. This reported level of psychological adjustment is relatively rare in the general population.

The test taker ... is likely ... to be prone to developing physical symptoms in response to stress. ...

There are no indications of emotional-internalizing dysfunction ...

There are no indications of disordered thinking ...

There are no indications of maladaptive externalizing behavior ...

These scales provide no further evidence of [interpersonal] dysfunction. ...

Somatoform disorder, if physical origins for neurological complaints have been ruled out[.] ... (2017 R.Ex. 5A)

The “areas for further evaluation” section of the MMPI-2-RF report states, “[e]xtent to which genuine physical health problems contribute to the score on the Neurological Complaints ... scale.” (Id.)

The report notes that the Appellant “produced scorable responses to all the MMPI-2RF items.” (Id.)

Finally, the MMPI-2-RF report found that the Appellant did not have an elevated T score on any of seven (7) critical responses, such as Anxiety, Helplessness/Hopelessness, Substance Abuse and Aggression. (Id.)

16. The Appellant’s PAI test report states about the Appellant, in part,

she has a “low risk of receiving ‘poorly suited’ rating” (i.e. 13% risk);

regarding endorsement of critical items with job-relevant content, the Appellant endorses fifteen (15) items, compared to the average ten (10) items for public safety employees;

regarding the likelihood of a negative behavior history in job-relevant areas (such as integrity problems, anger management problems and substance abuse proclivity), the Appellant was rated at low risk level for half of the subject matters and at a moderate risk level for the other half of the subject matters. (2017 R.Ex. 5)

17. On July 3, 2017, the Appellant met with Dr. Andrew Brown, a psychiatrist, for a psychiatric evaluation, as required by the BPD hiring process. Dr. Brown has been working regularly with the BPD since 2011, part-time prior to 2011, in the Occupational Health Services Unit and maintains a private practice. He has also been a consulting and a staff psychiatrist for a number of other municipalities and institutions since he earned his medical degree many years ago. In 2013, he was a consultant in the development of the 2014 HRD Medical Standards regarding appointment of law enforcement officers. (2017 R.Ex. 8)
18. In preparation for Dr. Brown's appointment with the Appellant, Dr. Brown reviewed the Appellant's answers to the medical questionnaire and the MMPI-2-RF and PAI reports. However, Dr. Brown did not review the Appellant's medical records prior to her interview with him. Often Dr. Brown does not receive the candidates' medical records until he has met with them for the evaluation. Even when he receives the candidates' medical records before he meets with candidates, such records are voluminous and he does not have time to review them all prior to his meetings with candidates. Dr. Brown usually reviews the candidates' medical records prior to writing the reports of his evaluations. (2017 Testimony of Brown and R.Ex. 7)
19. Dr. Brown usually asks applicants if they have taken any medication for emotional difficulties, psychological problems, anxiety, sleep, mood or behavior issues and if they have seen a mental health specialist. To Dr. Brown, such questions are important to help the evaluator determine if applicants have any illnesses or problems related to functioning or that are relevant to performing their duties. (Testimony of Brown) It was unclear

how Dr. Brown worded his questions to the Appellant about whether she had taken or been prescribed certain medicine. (Testimony of Brown)

20. Dr. Brown's meeting with the Appellant on July 3, 2017 lasted either one (1) hour or eighty (80) minutes or between forty (40) minutes to eighty (80) minutes. (Testimony of Brown) During the rest of the Appellant's interview with Dr. Brown, they primarily discussed her early history, academic history, work history and relationship history. (Testimony of Brown and Appellant) The Appellant told Dr. Brown about her stress when her father filed for bankruptcy but did not tell him about panic attacks she had at about that time although that information was in her medical record. The Appellant told Dr. Brown that she had been prescribed anxiety medications but had not taken them. (Testimony of Appellant) The Appellant told Dr. Brown in the interview that she had been prescribed Topamax, a weight-loss medication and disclosed on the health questionnaire that she had been prescribed Trazodone for sleep difficulties. (Testimony of Appellant)

21. Dr. Brown wrote a report on his interview of the Appellant, although his name does not appear on the report. The report is dated July 3, 2017, the date that he interviewed the Appellant but Dr. Brown did not recall if that is the date that he wrote his report. (2017 R.Ex. 7)

22. The longest paragraph in Dr. Brown's report relates to the Appellant's family history and her interest in law enforcement. This paragraph discusses some of the difficulties that led to the Appellant's parents' divorce when she was twelve years old and the difficulties that occurred later involving her father's bankruptcy, which prevented him from paying for the rest of the Appellant's college tuition. The Appellant reportedly resented that her

parents did not tell her that they were having financial difficulties prior to the bankruptcy. This part of the report also states that the Appellant considered returning to Arizona to pursue a job in law enforcement there but her mother was supporting her financially and she agreed to stay in Boston. (2017 R.Ex. 7)

23. In the employment history section of his 2017 report, Dr. Brown wrote that the Appellant had been unemployed since September 2014. Dr. Brown reported that the Appellant lacked interest in jobs such as waitressing or bartending, stating that she still has money saved from when she worked and that she receives financial support from her parents. Dr. Brown reported that the Appellant said she had applied for many, many jobs but without success and that she wants a stable job or career. The Appellant's last formal job was at the Boston Medical Center (BMC) from 2012 to 2014; she did not like the environment. She asked a coworker to take one of her shifts but the coworker did not show up and the Appellant received a warning. (Id.) Dr. Brown did not report that the Appellant had told him that she had been looking for another job in 2014 and believed that she would be hired by one particular employer after multiple positive interviews there. The Appellant resigned from the BMC, giving two (2) weeks' notice, but she did not get the other job. (Testimony of Appellant)

24. Dr. Brown's report states that the Appellant has "maintained many longer term friendships with a large number of peers" she has known since grade school and friends she made while attending college. (2017 R.Ex. 7 and Testimony of Appellant)

25. Dr. Brown wrote that the Appellant "appears cooperative", "no attempt to conceal negativity or hostility towards other", that her affect was "irritable, prickly, tough", that her thought content showed "no evidence of perceptual disturbance", that her thought

process was “**organized, goal directed.** ... No delusions. **No evidence of formal thought disorder.**” (Id.)(emphasis added) He wrote further that the Appellant lacked insight “into the nature and dynamics of continuing dependency on parents” but that her judgment was “adequate” and her cognition was “intact”. (Id.)

26. Reflecting on the MMPI-2-RF and PAI results, Dr. Brown wrote that the MMPI-2-RF report “raises concerns about the possible impact of underreporting” but that there are “**no indications of somatic, cognitive, emotional, thought, behavioral or interpersonal dysfunction.**” (Id.)(emphasis added)

27. Dr. Brown’s report states, with respect to the Appellant’s appearance, that she wore a “bright red” dress at her meeting with him. (Id.) The Appellant does not own a bright red dress. The dark blue dress the Appellant wore to the Commission hearing is the same dress she wore to her meeting with Dr. Brown. (Testimony of Appellant)

28. Upon reviewing the Appellant’s medical record, after his interview with her, Dr. Brown wrote in his report about her medical records in 2008 and 2010 without referencing the medical reasons for her doctor visits but including the Appellant’s statements to her primary care doctor in 2008 and 2010 about anxiety and/or anger towards her mother. Dr. Brown wrote further that the Appellant had been referred to a therapist in 2008 and 2010 without noting that the Appellant’s medical record did not include any counseling records. In addition, Dr. Brown wrote that a physician issued the Appellant a daily prescription for anxiety in 2008 and a different prescription for anxiety in 2010 as needed without indicating whether the Appellant filled the prescriptions and took the medications. (2017 R.Ex. 7) However, the Appellant did not even fill one of the prescriptions, nor did she participate in counseling at the time. (Testimony of Appellant)

Since Dr. Brown did not review the Appellant's medical record prior to his meeting with the Appellant, and his report does not disclose that he did not review her medical records until after their meeting, she had no opportunity to address his questions regarding anxiety medications and counseling seven (7) and nine (9) years prior to her applications for employment at BPD. The Appellant did not even fill one of the prescriptions or participate in counseling at that time. (Testimony of Appellant)

29. While Dr. Brown asserted at the Commission hearing that consulting a mental health counselor and taking anti-anxiety medication are not automatic disqualifiers for police candidates but he also asserted that the Appellant had a very significant psychiatric history. (Testimony of Brown) Notwithstanding such statements, Dr. Brown's report "conclusions" stated, in full, "[t]he administrative director of [the Occupational Health and Safety Unit (OHSU) of the BPD Human Resources office] was informed regarding the significant **disparities** between the insured's (sic) verbal and written reports to OHSU and this writer, on the one hand, and the content of the applicant's medical records. **The above-mentioned disparities reflect the presence of untruthfulness in this case.**" (2017 R.Ex. 7)(emphasis added)

30. Neither Dr. Brown's report, nor his testimony at the Commission, indicated that the Appellant had a condition or disorder, whether it was a Category A or B condition or disorder and which essential function of a police officer in the Medical Standards the Appellant was unable to perform because of such condition. (2017 R.Exs. 2 and 7)

31. Dr. Brown was unable to determine if the Appellant passed or failed the psychological evaluation based on the information he obtained. (Testimony of Brown) The Medical Standards provide, in part,

If you find that an examinee failed to provide a complete and accurate medical history and accurate medical history, you will need to explain such under Section I of the Medical Examination Form, ‘Physician’s Notice of Examinee’s Failure to Provide Complete & Accurate Medical History’. **By itself, failure to provide a complete and accurate medical history will not necessarily disqualify the examinee from meeting the medical standards, but may subject the examinee to administrative disqualification of employment** or other adverse action by the appointing authority. (2017 R.Ex. 2, p. 4)(emphasis added)

Dr. Brown’s report did not indicate which, if any, of the essential tasks of a police officer that the Appellant could not perform. (2017 R.Exs. 2 and 7)

32. Dr. Brown submitted his report to the OHSU and discussed it with the OHSU Administrative Director, Mark Cohen⁷. Dr. Brown and Mr. Cohen discussed whether Dr. Brown’s report should proceed to a secondary evaluation by a psychiatrist or a psychologist, pursuant to the Medical Standards. At that time, Dr. Brown was not thinking of the part of the Medical Standards regarding a lack of complete and accurate medical information above. (Testimony of Brown)

33. Then-BPD Director of Human Resources, Nancy Driscoll, working with then Police Superintendent Wolcott were the people who decided which candidates would be bypassed. (Testimony of Driscoll) At that time, Ms. Driscoll had been working at the BPD as Director of the BPD Human Resources office for approximately a year and a half. As HR Director, Ms. Driscoll oversaw the OHSU. Mr. Cohen told Ms. Driscoll that there were discrepancies regarding the Appellant’s medical information. Ms. Driscoll spoke to Dr. Brown about the supposed discrepancies and then she discussed the matter with then—Supt. Wolcott. Ms. Driscoll did not read Dr. Brown’s medical report; she did not know if Dr. Brown had reviewed the Appellant’s medical record prior to

⁷ The Respondent did not call Mr. Cohen to testify and there is no indication of Mr. Cohen’s knowledge of the HRD Medical Standards.

interviewing the Appellant. Ms. Driscoll and Dr. Brown did not discuss referring the Appellant for a second psychological evaluation. Thereafter, Ms. Driscoll drafted a bypass letter concerning the Appellant and discussed it with Dr. Brown. (Testimony of Driscoll)

34. By letter dated August 31, 2017, Ms. Driscoll informed the Appellant that she had been bypassed, writing, in pertinent part,

... As detailed herein, the [BPD] has significant concern with the discrepancies you have made in your verbal and written statements during the **medical process**. Therefore, you will not be appointed ...
Truthfulness is an essential job requirement for a police officer. When an officer is found to be untruthful, it damages the officer's ability to testify in future court proceedings. Testifying in court is a fundamental job requirement for a police officer, and therefore it is essential that an officer's integrity and credibility are intact. As a result, the untruthfulness identified in your application, as well as the other concerns detailed herein, deem you unsuitable for employment as a Boston police officer ... (2017 R.Ex. 9)(emphasis added)

Although the bypass letter references details therein, there are none. However, attached to 2017 R.Ex. 9 (the bypass letter) is a form from the Medical Standards signed by Dr. Affeln, who is associated with the BPD OHSU, on August 22, 2017. Dr. Affeln apparently marked the section of the form that states that the Appellant failed the medical exam but without marking the form to indicate whether the failure was based on a Category A or Category B condition.⁸ (Id.)

35. The Appellant timely filed the 2017 appeal. (Administrative Notice)

2019 Appeal

36. The Appellant took and passed the civil service police officer exam on March 25, 2017.
(Stipulation)

⁸ It is unclear if the form signed by Dr. Affeln, an M.D., was attached to the bypass letter sent to the Appellant.

37. HRD issued the eligible list in connection with the 2017 Exam and issued Certification 06203 to the BPD on March 29, 2019. (Stipulation)
38. The Appellant's name ranked 78th among those who had signed the Certification indicating their interest in employment as a BPD police officer. (Stipulation)
39. The Respondent appointed 126 candidates who signed the Certification, 21 of whom (not including those with the same rank as the Appellant) were ranked below the Appellant. (Stipulation)
40. The Appellant attended candidate orientation and was assigned to have her background investigation conducted by Det. Brian Rivers, who also conducted her background investigation when she was being considered for appointment in 2017. (Testimony of Appellant)
41. At the time of the Appellant's consideration for employment at the BPD in 2019, Mary Flaherty had been the BPD HR Director for one (1) year and, before then, she was the Deputy Director of HR for two (2) years. The 2019 hiring cycle was the first time that Ms. Flaherty was in charge of the entire hiring process. (Testimony of Flaherty)
42. After Detectives conducted background investigations on the candidates, they presented their findings to the BPD roundtable, which is usually comprised of Ms. Flaherty, a representative of the Professional Standards unit at the Deputy or Superintendent level, someone from the Legal Department and a commanding officer who oversees the investigations. The roundtable decided which candidates will receive conditional offers of employment, requiring the pertinent candidates to undergo medical (including psychiatric) exams and the physical aptitude exam.⁹ (Testimony of Flaherty)

⁹ This 2019 hiring process also included a new Mass. Police Training Committee physical examination. (Testimony of Flaherty)

43. At the BPD roundtable consideration of the Appellant's application and background investigation in 2019, there was an **"oversight"** in that the information that the BPD had about the Appellant did not indicate that she had been considered for employment in the 2017 hiring cycle and that she had filed a pending appeal at the Commission because the BPD bypassed her in 2017. (Testimony of Flaherty) Following the presentation regarding the Appellant's application to the roundtable in 2019, the roundtable issued her an offer of employment conditioned on her successful completion of medical and psychological exams. (Testimony of Flaherty; 2019 Ex. 2)
44. Pursuant to the Medical Standards, the Appellant was then psychologically evaluated. For that purpose, Dr. Seckler, a psychologist, met with the Appellant on or about October 4, 2019 and then by Dr. Fiore, a psychologist, on October 18, 2019. (2019 Exs. 7 and 8) Dr. Seckler has prepared psychological preemployment evaluations for the BPD and a number of other municipalities for years. (2019 Ex.15) During the 2019 BPD hiring cycle involved in this case, Dr. Seckler evaluated between twenty and thirty candidates. The reports of both Dr. Seckler and Dr. Fiore repeatedly mistakenly refer to the Appellant as "Michelle Roberts".¹⁰ (2019 Exs. 7, 8 and 15)
45. Prior to meeting with Dr. Seckler, the BPD OHSU staff administered the MMPI-2-RF and the PAI to the Appellant. (Testimony of Seckler)
46. The MMPI-2-RF report for the Appellant's exam states, in part,
- "Scores on the MMPI-2-RF validity scales raise concerns about the possible impact of under-reporting on the validity of this protocol. With that caution noted, there are **no indications of somatic or cognitive complaints, or of emotional, thought, behavioral, or interpersonal dysfunction.**"
- [there are] "[n]o specific psychodiagnostic recommendations [] indicated ..."

¹⁰ On cross-examination, Dr. Seckler acknowledged that he had changed his report at some later time to correctly refer to the Appellant's correct name. He did not recall that he had made any other changes to his report.

“[n]o specific recommendations for treatment are indicated ...”

“The test taker responded relevantly to the items on the basis of their content.”

“No specific recommendations for treatment are indicated ...”(2019 Ex. 4, pp. 8-9)(emphasis added)

On seven (7) scales (including, for example, suicidal ideation, anxiety and aggression), the report found that the Appellant does not have an elevated score. (Id.) Regarding interpersonal functioning scales, the report states that the scales “provide **no evidence of dysfunction.**” (Id.)(emphasis added)

47. The Appellant had a modest elevation on the MMPI-2-RF on candor relating to personal information. (2019 Ex. 4) The test report states, “This level of virtuous self-presentation may reflect a background stressing traditional values. ...” (2019 Ex. 4, p. 8) Dr. Seckler did not take into account the cultural background of the Appellant when determining if her score was a reflection of her background. (Testimony of Seckler)
48. The report on the Appellant’s 2019 completion of the PAI found that the Appellant’s “psychological rating risk factor” was 23%, a “**low risk of receiving a ‘poorly suited’ rating**” for the position of police officer. Among seven (7) “job-relevant” behaviors, the only high risk rating the Appellant received in the PAI report was a 61% probability of “integrity problems”. (2019 Ex. 5)
49. The Appellant met with Dr. Donald Seckler for the 2019 psychological interview for approximately one (1) hour on October 4, 2019. At about that time, the Appellant’s aunt had passed away and the Appellant’s cousin was on life-support. She did not mention these matters to Dr. Seckler because she was trying to remain composed and the discussion at the interview concerned matters from years ago. (Testimony of Appellant)

50. Prior to meeting with the Appellant, Dr. Seckler reviewed the report of Dr. Brown, who evaluated the Appellant when she applied to the BPD in 2017 (*supra*), the results of the Appellant's 2019 MMPI and PAI tests and the Appellant's 2019 background investigation. (2019 Ex. 7) Dr. Seckler's report does not indicate whether he reviewed the Appellant's medical records prior to the interview. In his report, Dr. Seckler mentions the Appellant's medical records only once stating, parenthetically, "(her 2010 medical records indicates (sic) a history of diagnosis and medical care for anxiety)." (*Id.*)

51. Dr. Seckler's report contained the following statements:

the Appellant] walked quickly, with a notable rush of energy relative to most police job candidates. She sat down, looked quickly around and around the interview and said 'I was scared.' I asked, 'of what'. She replied, 'that you were Dr. Brown.' She said that she and Dr. Brown had not 'seen eye to eye' and stated that he 'didn't say what I said to him.' She claimed to have told him that she was prescribed Trazodone and Ativan in the past, but had never taken the Ativan, and took the Trazodone, for 'only maybe three weeks' ...

Ms. Roberts (sic) went on to describe an important recent event in her life, the death of her paternal grandmother. ... Ms. Rogers said that she had provided part-time care for her grandmother. Neither she nor her father worked for some time during the grandmother's decline. Ms. Roberts (sic) admitted that she had not worked since 2014. She said that she got 'some money' from her parents to support herself. She claimed that she had applied for many jobs, with no good results ... but professed to have 'no idea' why she wasn't hired....

[The Appellant] recounted an education history of some success at [] high school ... but said she quit sports her senior year to 'make a point' because her coach had been fired. ... [H]er father declared bankruptcy and ... [s]he said she had 'no idea why that happened.' All she could say about this change in her life, was that 'he had bought horses or something.' ...

Roberts (sic) described an incident that she termed a 'nightmare' relating to conflict with her mother during Christmas vacation in 2007. She said that, at her father's urging at that time, she went to South Boston Health Center primarily to appease her mother, and had been seen for psychiatric evaluation. ... She said she left with a prescription for Xanax (10 mg) for anxiety, but did not proceed in the caregiving system. ...

She feels her failure to 'fill out the right paperwork' cost her the BPD position in 2017. ...

Ms. Roberts (sic) ... has 'never been in a long-term relationship' because she 'has no desire to settle down soon'.

(2019 Ex. 7)¹¹

52. Dr. Seckler's report included the following subjective statements, lacking sufficient support in the record:

Ms. Roberts (sic) seemed agitated, filled with feeling, and in marginal control ... He (sic) face and neck reddened. She was frequently in tears. Her speech was pressured and dramatic. Her ideas bounced from detail to detail ... At other times, she supplied almost no detail ... She [and her mother] ... 'couldn't stand being around each other ...

Ms. Roberts (sic) recounted a work history including a position ... at Boston Medical enter ... That job ended in conflict with co-workers and resignation.

Ms. Roberts (sic) presented with **intense and labile mood**. ... Her **executive skills appeared overwhelmed by the cascade of events, feelings, sand (sic) personal crises** she has experienced, **leading to either failure to register the information of contemporary inability to recall and express**. **This was consonant with both psychological trauma and borderline personality disorder, in both of which conditions thoughts and feelings generate 'flooding' of the ability to process and communicate important information**. She has struggled with work, relationships, impulse control, and the details, large and small, of life management. **She went to some length in rebutting the notion that she had been in therapy, but it was unclear to me, given her history, if seeking help would not have been a better choice**. The police job requires sustainable skills of self-management, emotional control, and the ability judiciously regulate responses to stress under challenging work conditions. **Successful police job candidates must be able to integrate training experiences and accept direction in a hierarchal (sic) command structure**. **Ms. Roberts (sic) has demonstrated deficits in these areas**. For these reasons, Ms. Roberts (sic) appears unsuitable for the police job at this time. Since the BPD is unable to moderate work conditions to provide accommodation for her **deficits**, Ms. Roberts (sic) should not move forward in the hiring process at this time. (2019 Ex. 7)(emphasis added)

There is no indication in the record that Dr. Seckler asked the reason for her tears.

53. I take administrative notice that "labile" is defined as, "readily or continually undergoing chemical, physical, or biological change or breakdown: unstable".

(<https://www.merriam-webster.com/dictionary/labile> May 27, 2020)

¹¹¹¹ Regarding her difficulties finding suitable employment, Dr. Seckler suggested to the Appellant that she look in the newspaper. (Testimony of Appellant)

54. While Dr. Seckler's report asserted that the Appellant's statements at the interview are "consonant" with trauma and "borderline personality disorder" that could affect her ability to process and communicate important information, he did not indicate whether it was a Category A complete disqualification or a Category B condition. (2019 R.Exs. 7)
55. Dr. Seckler's report made no reference to the Appellant's large circle of friends she has known since elementary school. (2019 Ex. 7; Testimony of Appellant)
56. At the Commission hearing, Dr. Seckler attempted to add information to his report to indicate that there were a number of police officer essential tasks in the HRD Medical Standards that the Appellant is unable to perform. However, he acknowledged that he had not made such statements in his report and that his report did not find that she was disqualified from being a police officer on the basis of a condition or disorder. He did not recall that the Appellant was a teenager or young adult when she had a particularly difficult relationship with her mother and mentioned to her primary care physician in 2008 and 2010 (when she was 19 and 21 years of age) that she was having problems with anxiety. Although Dr. Seckler's report stated that the Appellant was "frequently in tears" during her interview, in his testimony at the Commission, he could not recall when during her interview the Appellant teared up. (Testimony of Seckler)
57. Dr. Lance Fiore conducted the second psychological evaluation of the Appellant in connection with the Appellant's 2019 application to the BPD. A psychologist, Dr. Fiore has been in practice for many years. He has been conducting preemployment evaluations for the BPD for at least several years and also performs such evaluations for a number of other municipalities. (Testimony of Fiore; 2019 Ex. 16)

58. Dr. Fiore interviewed the Appellant on October 18, 2019 for approximately one (1) hour and on October 21, 2019, he wrote his evaluation.¹² Dr. Fiore's evaluation states, in part, that, he reviewed "all pertinent supporting application materials" relating to the Appellant, including the reports of Dr. Brown and Dr. Seckler. (2019 Ex. 7) It is unknown if he reviewed the results of the Appellant's 2017 or 2019 PAI and MMPI-2-RF test results or the Appellant's medical record, and, if he did, whether he reviewed them before or after he interviewed her interview. (Id.)

59. The Appellant told Dr. Fiore that she had had a difficult relationship with her mother when she was a teenager when her parents divorced. The Appellant told Dr. Fiore that, beginning in her early 20s, her relationship with her mother improved, although the Appellant allegedly told Dr. Seckler recently that she and her mother were seeing each other often but they still had difficulties. (2019 Ex. 7; Testimony of Appellant)

60. Dr. Fiore asked the Appellant about the incident in 2007, when she was a teenager, when she had a disagreement with her mother and her mother told her that she needed help. The Appellant went to the Boston Health Center, met with a counselor on that occasion who gave her a prescription for Xanax that she did not fill. The Appellant did not seek therapy thereafter although she told Dr. Fiore that she disclosed to a primary care provider at the time that she was having a difficult relationship with her mother. The Appellant further disclosed to Dr. Fiore that she met with a counselor at that time who prescribed Celexa but the Appellant did not fill the prescription. (2019 Ex.8; Testimony of Appellant)

¹² Dr. Fiore acknowledged in his testimony that his report to the BPD about his evaluation of the Appellant referred to her as Ms. Roberts and that there was an error in a date pertaining to the Appellant's employment at the BMC, which errors were corrected approximately one week after he submitted his report to the BPD. Since Dr. Fiore relied on Dr. Seckler's report and Dr. Seckler also referred to the Appellant as Ms. Roberts, the error appears to have emanated from Dr. Seckler.

61. Like Dr. Seckler, Dr. Fiore's report mentioned the Appellant's decision in high school in 2007 to leave her basketball team to express her disagreement that her coach had been terminated. (2019 Ex.8)
62. Like Dr. Seckler, Dr. Fiore wrote that, after high school, the Appellant went to college in Arizona but that she did not complete her education because of the family financial difficulties. Thereafter, Dr. Fiore wrote that the Appellant returned to Boston and worked as a waitress and at a private gym, following which she worked at the Boston Medical Center (BMC). Dr. Fiore wrote incorrectly that the Appellant worked at the BMC from 2012 to 2019 when, in fact, she worked there from 2012 to 2014. Dr. Fiore accepted Dr. Seckler's report, which lacked sufficient support, that the Appellant left the BMC because of a "conflict with co-workers and termination" even though the Appellant had only received a warning about a shift coverage and she resigned, giving BMC two (2) weeks' notice because she believed she was about to be offered a job involving veterans because she had been repeatedly interviewed for that job. (2019 Ex. 8; Testimony of Fiore and Appellant)
63. Like Dr. Seckler, Dr. Fiore wrote that the Appellant had applied to many jobs but not secured one in several years, other than odd jobs, and was financially supported by her parents. (2019 Ex.8)
64. Like Dr. Seckler, Dr. Fiore wrote that the Appellant has "never been in a long term relationship" stating "I haven't settled down with anybody". (2019 Ex. 8)
65. Like Dr. Seckler, Dr. Fiore did not inquire about the Appellant's large group of friends whom she has known since they all attended elementary school, as well as friends she made when she attended college. (Testimony of Appellant)

66. Dr. Fiore concluded his report with a “Discussion” stating, in part,

“Ms. Roberts (sic) presented as an intense, mildly agitated woman who nonetheless was able to participate in this evaluation....
Ms. Roberts (sic) reviewed with me salient details of her life. Most prominent are differing characterizations of life events. Test results indicate ‘possible doubtful candidness in reporting unflattering details of personal feelings and experiences.’ She described a long-standing conflictual relationship with her mother that she reported improved as she moved into her early 20’s who she sees several times a week. ...
She has a very difficult occupational history. ... she displayed little if no insight as to why (2019 Ex. 8)

67. Dr. Fiore’s report made no finding that the Appellant had a condition or disorder, as either a category A disqualification condition or a category B condition, nor did he identify an essential task of a police officer in the Medical Standards that the Appellant would be unable to perform. However, Dr. Fiore’s report states that the Appellant would have problems working in the “hierarchical” work setting of a police officer, like Dr. Seckler’s report, similarly without explaining what aspect of the Appellant’s interview and test scores support such an assertion. (2019 Ex. 8)

68. During his testimony at the Commission hearing, Dr. Fiore attempted to add information to his report to indicate that there were a number of police officer essential tasks in the HRD Medical Standards that the Appellant is unable to perform. However, he acknowledged that he had not made such statements in his report and that his report did not find that she was disqualified from being a police officer on the basis of a condition or disorder. (Testimony of Fiore)

69. By letter dated November 15, 2019, HR Director Flaherty notified the Appellant that she had been bypassed, stating, in pertinent part,

... As detailed herein, the [BPD] has significant concern with the **discrepancies** you have made in your verbal and written statements **during the 2017 medical process. Additionally, the results of your psychological screening indicate**

that you cannot adequately perform the essential functions of the public safety position ... and a reasonable accommodation is not possible. ...

Truthfulness is an essential job requirement for a police officer. When an officer is found to be untruthful, it damages the officer's ability to testify in future court proceedings ...

[Dr.] Seckler ... conducted your first level psychological screening as part of the approved (sic) process. The police job requires sustainable skills of self-management, emotional control and the ability to judiciously regulate responses to stress under challenging work conditions. Successful police job candidates must be able to **integrate training experiences and accept direction in a hierarchical command structure**. The evaluating psychologist found **deficits** in these areas. As a result of this conclusion, you were evaluated by [Dr.] Fiore ... Dr. Fiore identified problems related to managing emotions, sustaining productive relationships and accepting direction in a hierarchical work structure.

... Your psychological evaluations indicate that you cannot adequately perform these essential functions. As the police officer position cannot be modified to compensate for these **deficits**, the [BPD] finds you ineligible for appointment ... at this time. ...

(2019 Ex. 14)(emphasis added)

70. The Appellant timely filed the 2019 appeal. (Administrative Notice)

Applicable Law

G.L. c. 31, s. 1 defines basic merit principles of civil service, in pertinent part, as follows,

(a) recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment; ... ; ... (e) assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens. *Id.*

The role of the Civil Service Commission is to determine “whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” City of Cambridge v. Civil Service Commission, 43 Mass.App.Ct. 300, 304 (1997). Reasonable justification means the Appointing Authority's actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928).

Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971).

G.L. c. 31, s. 2(b) requires that bypass cases be determined by a preponderance of the evidence.

A "preponderance of the evidence test requires the Commission to determine whether, on the basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient."

Mayor of Revere v. Civil Service Commission, 31 Mass.App.Ct. 315 (1991).

Appointing authorities are rightfully granted wide discretion when choosing individuals from a certified list of eligible candidates on a civil service list. The issue for the commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision." Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983). See Commissioners of Civil Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003).

Analysis

The Respondent has failed to establish by a preponderance of the evidence that it had reasonable justification for bypassing the Appellant in 2017 and 2019.

2017 Appeal

In the 2017 Appeal, the Respondent issued a conditional offer of employment to the Appellant and met with Dr. Brown for the first level psychological evaluation. Before meeting with the Appellant, Dr. Brown reviewed her MMPI-2-RF and PAI exam results and other background information he was provided but he did not review her medical record prior to interviewing the Appellant. After interviewing the Appellant, Dr. Brown decided that the Appellant was untruthful because she answered "no" on the BPD Health Questionnaire when asked if she had received "any type of

psychiatric treatment, counseling, or talk therapy of any kind” (2017 R.Ex. 7; Testimony of Appellant) when, in fact, she testified credibly that she had not received any such counseling or talk therapy. The Appellant had told her primary medical professional that she was having trouble with anxiety and the medical professional suggested that she receive counseling in 2008 and 2010 but she chose not to do so. There were no mental health provider reports or notes in the Appellant’s medial record. Dr. Brown acknowledged that when the Health Questionnaire asked if the Appellant had been “prescribed medication for anxiety, stress, pain or sleep” (2017 R.Ex. 7), the Appellant wrote that she had taken “Trazadone”, for a couple of weeks after being the family member who found her deceased grandmother but she did not mention that she had taken Celexa and Xanax in 2010 because she did not take the medications and did not even fill the prescription for one of them. When allegations of untruthfulness are made against a police department candidate, the effects can have devastating effects on a hoped-for career in law enforcement. Such allegations should be carefully reviewed before they are made. The Appellant had no opportunity to address the alleged untruthfulness. If Dr. Brown had reviewed the Appellant’s medical record prior to her interview, as required by the HRD Medical Standards, he could have discussed this with her.

The Appellant was not given a second psychological evaluation, the opportunity to provide additional information for the roundtable’s consideration or a discretionary interview. In addition, Dr. Brown’s report does not establish that the Appellant failed the psychological evaluation. His report scrutinizes her relationship with mother when she was a teenager and young adult years ago and having to drop out of college because her father was bankrupt and could no longer afford to pay her tuition. His report does not indicate that the Appellant has a psychological disorder, either a Category A or Category B condition or disorder, nor does it

indicate with sufficient support that because of a disorder or condition she was unable to perform the HRD Medical Standards list of essential tasks of a police officer.

The BPD's actions in connection with the 2017 appeal run afoul of key provisions of an appropriate psychological evaluation. First, in Boston Police Department v. Kavaleski, 463 Mass. 680 (2012)¹³ the Supreme Judicial Court confirmed that the requirements of the HRD Medical Standards must be met, meaning that in a bypass for original appointment based on a failed psychological evaluation, the Respondent must prove that its psychological assessment establishes that the candidate has a psychological condition or disorder, identify whether the condition or disorder is a disqualifying Category A disorder or a conditional disqualification as a Category B and, if it is a conditional disqualification, the evaluation must indicate the specific essential task or tasks that the candidate's condition or disorder prevents him or her performing. Dr. Brown did not establish a disorder or condition, whether it was a Category A or Category B disorder or condition, and did not identify what essential tasks the Appellant could not perform because the alleged disorder or condition.

The Respondent's 2017 bypass also ran afoul of the SJC's decision in Kavaleski because Dr. Brown stepped outside his role as a psychologist. Specifically, the SJC said that the evaluator's "sole task" was to determine if the candidates had a "psychiatric condition that would prevent her from performing, even with reasonable accommodation, the essential functions of the job." Id. at 694. In so stating, the Court cited G.L. c. 150B, s. 4 (16), the provisions of the MCAD statute regarding preemployment inquiries. Dr. Brown acknowledged that he made no such findings, reporting instead only that there were discrepancies in her information which he said were untruthful.

¹³ I note that the Supreme Judicial Court in Kavaleski found that, unlike in the instant appeal, the psychological evaluator in Kavaleski had reviewed the candidate's medical record prior to meeting with the candidate.

In addition to the Respondent's inappropriate reliance on Dr. Brown's untruthfulness allegations, the Respondent's decision to bypass the Appellant based thereon undermines the legal requirement that an employer issue a conditional offer to a candidate before subjecting them to medical and psychological evaluations. In Morley v Boston Police Department, G1-16-096 (2016), the Commission similarly found that the decision to bypass the candidate for alleged untruthfulness "occurred after he received a conditional offer of employment" which was conditioned upon his passing a medical and psychological exam and the Respondent had obtained medical information about the candidate, rendering it "impossible to know if the [BPD bypass] ... decision was influenced by their knowledge of Mr. Morley's medical history [...], the precise conundrum that the MCAD guidelines are meant to prevent." Id. I note that the MCAD guidelines section IV regarding preemployment inquiries states, "[i]n general employers may not ask applicants about handicaps or disabilities until after the applicant has been given a conditional job offer. The purpose of this restriction is to isolate consideration of an applicant's job qualifications from any consideration of his/her medical or disability-related condition" <https://www.mass.gov/files/documents/2018/12/11/MCAD%20Guidelines%20Disability%20Discrimination%20in%20Employment.pdf> (June 9, 2020). Having falsely based its 2017 bypass of the Appellant on an allegation of untruthfulness made after she was given a conditional offer of employment and following a psychological exam, the Respondent's 2017 bypass of the Appellant cannot stand.

2019 Appeal

The Respondent also failed to establish that it had reasonable justification to bypass the Appellant in 2019. First, the 2019 bypass relied on the "untruthfulness" that the Respondent asserted as the reason for its bypass in 2017, which has been found here to be fatally flawed.

The second reason the Respondent gave for bypassing the Appellant in 2019 was that she failed the psychological evaluation in 2019. However, the Respondent has failed to establish by a preponderance of the evidence that it had reasonable justification to bypass the Appellant on that basis. In what the BPD HR Director described as an “oversight”, the BPD issued a conditional offer to the Appellant in 2019 even though it bypassed her in 2017 for alleged untruthfulness. On this occasion, the Appellant was deemed to have failed a first level psychological exam by Dr. Seckler and a second level psychological exam by Dr. Fiore. Dr. Seckler reviewed Dr. Brown’s evaluation two years earlier and Dr. Fiore reviewed Dr. Brown’s and Dr. Seckler’s evaluations. The Appellant’s 2019 MMPI-2-RF and PAI reports were mostly unremarkable. Dr. Seckler construed the Appellant’s answers to his questions in an exaggerated manner with subjective remarks and little evidence in support of his assertions.

First, Dr. Seckler subjectively commented on the way that the Appellant walked into the interview, asserting that the Appellant “walked quickly, with a notable rush of energy ... she sat down, looked quickly around and around the interview room and said ‘I was scared.’”

(Testimony of Appellant) However, the Appellant was concerned that she would be interviewed again by Dr. Brown, who the Appellant believed had not reported her comments at their interview correctly.

Dr. Seckler also wrote in his report that the Appellant was “frequently in tears” during his interview but did not ask her why. Apparently, Dr. Seckler found it important enough to put in his report but not important enough to ask her why. The Appellant credibly testified at the Commission hearing that the reason she was tearful at the interview was that her aunt had just passed away and her cousin was on life support. This renders Dr. Seckler’s observation in this regard inconsequential.

Dr. Seckler's report failed to note that the Appellant's medical record did not include the reports of any mental health providers and that the reason there were no such notes is that she did not participate in mental health therapy. Instead, he focused on the two incidents (one in 2008 when the Appellant was a teenager, and the other in 2010, when the Appellant was a young adult) that she reported to her primary care physician that she was having difficulty with anxiety and that she had been offered but did not take Celexa and Xanax and did not even fill one of the prescriptions.

Dr. Seckler's report put emphasis on the Appellant's difficult relationship with her mother when she (the Appellant) was a teenager and a young adult, as if such difficulties are unusual, especially when parents divorce during their children's teen years. Similarly, Dr. Seckler focused on the Appellant's decision in high school, years ago, not to play in a sport to protest the firing of her coach when teenagers not infrequently make decisions that an adult would deem ill-advised.

Dr. Seckler also appeared to find the Appellant's lack of a long-term romantic relationship at the time a matter of concern, ignoring or not knowing that she has a large group of friends who have remained friends since grade school, in addition to friends she maintains from college.

Dr. Seckler clearly thought it was odd or not credible that the Appellant did not know the details of the Appellant's father's bankruptcy when each parent addresses such matters with their children as they deem appropriate and the Appellant was embarrassed about the subject and the Appellant's responses in this regard hardly qualify as a reason that a candidate cannot perform the essential functions of a police officer.

With insufficient support, Dr. Seckler asserted that the Appellant had been fired from her job at the BMC when, in fact, she resigned, with two weeks' notice, when she believed that she was about to be hired elsewhere.

Moreover, Dr. Seckler's report concluded, with insufficient support, that the Appellant has **"deficits" relating to the "integrat[ion of] training experiences and accept [ing] direction in a hierarchical command structure"**. 2019 Ex. 7. In any event, a "deficit" is not a disqualifying condition or disorder under the HRD Medical Standards and Dr. Seckler did not indicate that the Appellant had a condition or disorder, whether it was a Category A or Category B condition, and which essential functions the Appellant was not able to perform because of such condition or disorder, as required in Kavaleski.

Further, in contravention of Kavaleski, Dr. Seckler concluded that the Appellant's behavior was "consonant" with trauma and a personality disorder. In Kavaleski, the Court stated that such characterizations are "vague assessments" lacking affirmation. Id. at 693. The only actual difficulty (which is also not a psychological condition or disorder) that Dr. Seckler noted that the Appellant had was that she had not been employed in a formal job for several years. However, that information was reflected in the Appellant's file prior to the roundtable and, in an "oversight" the Respondent apparently overlooked it. As noted above regarding the 2017 Appeal, it is not acceptable to give a candidate a conditional offer of employment, conduct a psychological exam and then allege that the basis for the bypass is information that the Respondent had when it issued the conditional offer. Thus, Dr. Seckler's report does not provide reasonable justification for the Appellant's bypass.

The 2019 bypass appeal also must not stand because Dr. Fiore did not find that, as required in Kavaleski, the Appellant had a psychological condition or disorder and indicated

whether it was a Category A or Category B condition or disorder and the record here contained insufficient facts to support the conclusion that the Appellant was unable to perform the essential tasks of a police officer. Dr. Fiore's report relies on Dr. Seckler's report to a significant extent, even including Dr. Seckler's assertion that the Appellant was fired from her job at the BMC when her credible testimony indicated that she had been looking for another job, had attended successful interviews expecting to be hired elsewhere and, therefore, resigned. Dr. Fiore even reiterated Dr. Seckler's assertion that the Appellant has "**deficits**" relating to the "**integrat[ion of] training experiences and accept [ing] direction in a hierarchical command structure**" with insufficient support therefor.¹⁴ 2019 Ex. 7.

Conclusion

Accordingly, for the above stated reasons, the bypass appeals of Ms. Rogers, docketed G1-17-184 and G1-19-240, are both hereby **allowed** and it is hereby ordered that,

- HRD, or the Respondent in its delegated capacity, shall place the name of Michelle Rogers at the top of any current or future Certification for the position of Boston Police Officer, so that she may be processed in the round of hiring for the next available Boston Police Academy class, until she is appointed or bypassed.
- BPD may elect to require Ms. Rogers to submit to an updated background investigation but BPD shall not bypass Ms. Rogers as a result of any facts or circumstances in her background which it had knowledge of prior to making its conditional offer of employment to her in connection with the 2017 Appeal and the 2019 appeal.

¹⁴ During their testimony, both Dr. Seckler and Dr. Fiore attempted to add reasons to their written reports for finding that the Appellant had failed the psychological evaluations. As indicated at the hearing, since G.L. c. 31, s. 27 and the Personnel Administrator Rules require the employer to notify a candidate of the reasons for the candidate's bypass and bar the employer from adding reasons for the bypass thereafter, the testimony of Dr. Seckler and Dr. Fiore in this regard was not considered in this decision.

- Subject to Ms. Rogers passing the background investigation referenced above, the BPD shall extend a conditional offer of employment to Ms. Rogers. In the event that BPD extends a conditional offer of employment to Ms. Rogers following a background investigation, BPD may elect to require Ms. Rogers to submit to an appropriate psychiatric and medical screening in accordance with current BPD policy in the ordinary course of the hiring process. In the event of such evaluation, such screening shall be performed, de novo, by qualified professional(s) other than any of those who have performed prior psychological evaluations of Ms. Rogers.
- If Ms. Rogers is appointed as a Boston Police Officer, she shall receive a retroactive civil service seniority date the same as those appointed from Certification No. 04401 in connection with the 2017 Appeal. This retroactive civil service seniority date is not intended to provide Ms. Rogers with any additional pay or benefits including creditable service toward retirement.

Civil Service Commission

/s/Cynthia A. Ittleman

Cynthia A. Ittleman, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on June 18, 2020.

Either party may file a motion for reconsideration within ten days of the receipt of the Commission's decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:

Joseph Sulman, Esq. (for Appellant)

Joseph Donnellan, Esq. (for Appellant)

Winifred Gibbons, Esq. (for Respondent)

David Fredette, Esq. (for Respondent)